

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HARVEY L. WAGNER

Appeal No. 1997-1899
Application No. 08/407,145¹

ON BRIEF

Before THOMAS, BARRETT, and DIXON, **Administrative Patent Judges**.
DIXON, **Administrative Patent Judge**.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-7, which are all of the claims pending in this application.

We REVERSE.

¹ Application for patent filed March 20, 1995.

BACKGROUND

The appellant's invention relates to a wavelength-tunable eye protection device to protect a user's eye from a laser light source. An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below.

1. An eye protection device for protection against light from a source of light, said device comprising:

a wavelength-tunable filter for passing at least one wavelength selected in response to a control signal;

mounting means for mounting said filter before at least one eye of a user; and

control means coupled to said filter for setting said passing wavelength to a wavelength other than a wavelength at which said light source emits.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Burbo et al. (Burbo)	4,202,601	May 13, 1980
Gunning, III et al. (Gunning, III)	4,508,964	Apr. 02, 1985

Claims 1-4² stand rejected under 35 U.S.C. § 103 as being unpatentable over Burbo in view of Gunning, III.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the examiner's

² The examiner withdrew the rejection of claims 5-7 in the supplemental answer at page 3 and objected to these claims as dependent on a rejected base claim.

answer (Paper No. 7, mailed Dec. 24, 1996) and the supplemental examiner's answer (Paper No. 9, mailed Feb. 5, 1997) for the examiner's reasoning in support of the rejections, and to the appellant's brief (Paper No. 6, filed Dec. 6, 1996) and reply brief (Paper No.8, filed Jan. 10, 1997) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

As pointed out by our reviewing court, we must first determine the scope of the claim. "[T]he name of the game is the claim." **In re Hiniker Co.**, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998). We find that the examiner has not provided a teaching or convincing line of reasoning why one skilled in the art would have desired to use a wavelength-tunable filter in the system of Burbo. Burbo states:

This adjustable ring is coupled to the polarizer plate **21** associated with each housing and hence, permits the operator or user to rotate the plate and hence, the polarizer element **21** with respect to the elements **20** and **22**.

It is important, as above indicated, to note that the purpose of the blue-green filter **24** is to compensate for the deficiencies inherent in the infrared transmission characteristics of the polaroid materials employed in plates **20**, **21** and **22**.

As indicated above, present polarizers as commercially available, do not transmit the infrared components of light in a linear manner as compared to other frequency components contained in the light beam. Hence, the blue-green filter serves to attenuate transmitted light components about the near infra-red spectrum which are for example, emitted by foliage such as grass, trees and so on. In this manner, the output light from the entire arrangement depicted is indicative of nighttime conditions. By rotating the plate **21** with respect to plates **20** and **22**, one can thereby achieve a variation in the light directed to the night vision device and hence, by such rotation one can simulate various nighttime conditions as starlight, overcast moonlight, or direct moonlight and one can do so in any particular daylight condition as from early dusk to noon day sunlight.

(See Burbo at column 3, line 57 to column 4, line 13.) Burbo clearly compensates for the variations in light for the entire day from dawn to dusk without the need for a variable filter as the examiner maintains on page 6 of the answer. Burbo states that the blue-green filter is to compensate for inherent problems induced by the use of the polarizers, therefore, in our view, there would have been no motivation to vary this filter since this would negate the needed compensation.

The examiner argues that the "combination of the static blue-green filter in addition to the polarization plates makes a mechanically alterable (through attenuation by the polarization plates) frequency filter (through the blue-green filter)."

(See supplemental answer at page 2.) We disagree with the examiner as discussed above. The examiner relies upon the Burbo at column 3, lines 14-27 which states:

Referring to FIG. 2, there is shown a filter arrangement which can be employed and included in each housing as **16** and **17** to provide night time simulation during a daytime operation.

The filter shown includes a first polarizing plate **20**, a second polarizing plate **21** and a third polarizing plate **22**. A fourth plate **24** is shown and is positioned in the optical path as well. The plate **24** is a glass plate which operates as a blue-green filter. The filter compensates for deficiencies in the infrared transmission characteristics of the polaroid plates **20**, **21** and **22** to avoid a contrast reversal effect. Essentially, contrast reversal is the effect of the high reflectivity in the near infrared of most green foliage which causes the foliage to appear white when viewed through the goggles.

Appellant argues that the polarization plates are not frequency/wavelength tunable as required by the language of the claim 1. (See reply brief at pages 2-4.) We agree with appellant. Furthermore, the polarization plates merely produce (plane) polarized light which is further limited through the interaction of the three plates to limit the quantity of light passing through the plates to the filter. The variation in the light is in the quantity rather than the frequency/wavelength of the light which is varied.

Appellant argues that the examiner has not provided a nexus for the combination of the tunable filter of Gunning III with the training aid of Burbo. (See brief at pages 5-10 and reply brief at page 5.) We agree with appellant. In light of the deficiencies discussed above, the examiner has not provided a convincing line of reasoning why it would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate a wavelength-tunable filter into the training aid as taught by Burbo.

To reject claims in an application under section 103, an examiner must show an un rebutted ***prima facie*** case of obviousness. **See In re Deuel**, 51 F.3d 1552, 1557, 34 USPQ2d 1210, 1214 (Fed. Cir. 1995). In the absence of a proper ***prima facie*** case of obviousness, an applicant who complies with the other statutory requirements is entitled to a patent. **See In re Oetiker**, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). On appeal to the Board, an applicant can overcome a rejection by showing insufficient evidence of ***prima facie*** obviousness or by rebutting the ***prima facie*** case with evidence of secondary indicia of nonobviousness.

In re Rouffet, 149 F.3d 1350, 1355, 47 USPQ2d 1453, 1455 (Fed. Cir. 1998). Here, we find that appellant has overcome the ***prima facie*** case of obviousness by showing insufficient evidence by the examiner of obviousness. Therefore, we will not sustain the rejection of claim 1 nor the rejection of dependent claims 2 and 3. Similarly, claim 4 contains the same limitation concerning the wavelength-tunable filter.

CONCLUSION

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To summarize, the decision of the examiner to reject claims 1-4 under 35 U.S.C. §
103 is reversed.

REVERSED

JAMES D. THOMAS
Administrative Patent Judge

LEE E. BARRETT
Administrative Patent Judge

JOSEPH L. DIXON
Administrative Patent Judge

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